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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1147

EDWARD VOGT,

Petitioner,

against

RUSSELL G. OSWALD, Commissioner of the New York Department of Correctional Services,

and

J. E. LAVALLEE, Superintendent, Clinton Correctional Facility, Dannemora, New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Opinions Below

The decision-order of the United States District Court for the Northern District of New York (PORT, D.J.) dated February 27, 1973 denying petitioner's writ of habeas corpus is unreported and appears in the appendix to the

petition for certiorari (A-1-A-11).* The order of the United States Court of Appeals for the Second Circuit affirming the order of the District Court, is also unreported and appears in the appendix to the instant petition for certiorari (A-12-A-13).

In his petition, Vogt, a State prisoner attacks his conviction in the state courts. Petitioner was convicted of murder in the first degree in the New York Supreme Court, New York County on August 7, 1961 (SARAFITE, J.) after a trial by jury and was sentenced to a term of life imprisonment. This conviction was unanimously affirmed by the Appellate Division of the New York Supreme Court (*People* v. *Vogt*, 19 A D 2d 696, 241 N.Y.S. 2d 1007 [1st Dept. 1963]). On appeal to the New York Court of Appeals, the court reserved decision and remanded the case for a "Huntley" Hearing to determine the voluntariness of petitioner's confession (*People* v. *Vogt*, 15 N Y 2d 725, 205 N.E. 2d 203 [1965]).** Following a Huntley Hearing held on May 24, 1965, Justice Sarafite concluded that petitioner's confession was voluntarily made. This decision was affirmed by the Appellate Division (*People* v. *Vogt*, 31 A D 2d 787, 298 N.Y.S. 2d 461 [1st Dept. 1969]) and by the New York Court of Appeals (*People* v. *Vogt*, 27 N Y 2d 955, 267 N.E. 2d 108 [1970]).

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1254(1).

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* Unless otherwise indicated arabic numerals preceded by "A" refer to pages in the appendix to petitioner's petition for certiorari.

** The "Huntley" hearing refers to the special hearing to determine the voluntariness of a confession in accordance with *People* v. *Huntley*, 15 N.Y. 2d 72, 204 N.E. 2d 179 (1965) described by this Court as "the State's procedural response to the Court's decision in *Jackson* v. *Denno*", 378 U.S. 368. See *LaVallee* v. *Delle Rose*, 410 U.S. 690, 691.

Question Presented

Should this court exercise its certiorari jurisdiction where the petitioner was provided with a full and fair state court evidentiary hearing on the issue of the voluntariness of his confession and the courts below found that the State Trial Judge reliably concluded that the confession was the product of petitioner's own free will?

Statement of the Case

On the evening of December 23, 1960, while delivering a Christmas tree to an apartment in Manhattan, a 14-year old boy named Robert Guittari was stabbed to death. During the afternoon of December 24, the police went to petitioner's home at 15 Cooper Street, and took him to the station house for questioning (519).* Petitioner was questioned about his personal history by Lt. Michael Willis, Commanding Officer of the 34th Detective Squad. This questioning began at about 3:10 P.M. and took place in the presence of other police officers (525, 529-530). Initially, petitioner gave several different accounts of his activities just prior to and at the time of the stabbing but then he asked to speak to Lt. Willis alone (534-543). It was during this private conversation with Lt. Willis that he confessed to the crime.

He told Willis that on the 23rd of December he went to his home at 15 Cooper Street at 7:30 P.M. and had some cake and milk. He then went out on an errand for his

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* Numbers in parentheses are references to page numbers in the trial transcript which was introduced into the record of the Huntley Hearing. When preceded by "H", these references are to the Huntley Hearing transcript itself. When preceded by "H" and followed by "a", these references are to the minutes of the second phase of the Huntley Hearing which took place on May 24, 1965.

mother. While in the street he saw a boy dragging a Christmas tree and thought that he might be making a delivery and might have money with him (544-545). He went into the building at 25 Cooper Street to see if Guittari would come that way. When Guittari did come into the building, the petitioner quickly got into the elevator with him, pressing the button for the 6th floor though Guittari wanted to go to the basement (547). At the 6th floor he pulled Guitarri out of the elevator and demanded money from him (547-8). Petitioner grabbed Guittari as he tried to run away and slapped him several times in the face. Guittari then said, "Leave me alone, leave me alone. You're crazy, you're crazy to do a thing like that. I'm going to call for help. You're crazy" (548). Incensed by being called "crazy", petitioner pulled out a knife from a sheath he kept in his right boot and stabbed Guittari several times as he said "I'll show you who's crazy" (548-9).

Petitioner then heard a door open on the sixth floor so he ran to the roof, threw the knife towards the building at 24-26 Cooper Street and lowered himself from the roof at 25 Cooper Street to the roof at number 19 (549-551). As he did so, he injured his right foot but was able to cross over to number 15 Cooper Street where he lived (551). He remained in his apartment briefly and then, returned to work at a Christmas tree store (551-2).

Petitioner also identified for Lt. Willis the knife and sheath found near where he had dropped them (552, 637).*

He repeated his confession to the other officers (560-562, 651-653). Then, at about 6 P.M., he was taken by Lt. Willis and Dets. James Farrell and Joseph Brady to

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* The knife was further identified as petitioner's when, later that evening, Lt. Willis brought petitioner and his friend Larry Culkin together. Showing Culkin the knife, petitioner had said, "Larry . . . Don't you remember this knife? . . . I showed it to my house a few weeks ago." (430-1)

his home. There, after the officers instructed him to tell his mother what he had told them, he said, "I did it" (564-566). She refused to believe him, however, and asked him whether he had been beaten, but he said, "No, Mom. I did it" (568).

Thereafter, the officers gathered the clothing which petitioner had worn at the time of the killing and went with petitioner to 25 Cooper Street (568-9). They went into the building with him and took the elevator to the sixth floor as the petitioner reiterated the details of his encounter with Guittari (569-570). He indicated the place where he had demanded money from Guittari and demonstrated with a pen how he had stabbed the boy with a knife (850-859). He then took the officers up the stairway he had used for his escape to the roof and showed them where he had been when he had thrown the knife towards 24 Cooper Street (861, 865). He also indicated how he had dropped from the roof at 25 Cooper Street to the roof at number 19 (875-877).

After the petitioner's re-enactment of the crime, he was brought back to the squad room. This was at about 7 P.M. (570). His attorney arrived at the station house at about 7:40 P.M. but was not permitted to see petitioner until about 11:45 P.M. (H-8a). In the interim, an Assistant District Attorney arrived at the station house and took a statement from the petitioner (571). This was recorded stenographically but not admitted into the record at the trial.

About 12:20 A.M., Det. Farrell and other officers brought petitioner to Jewish Memorial Hospital to have his injured ankle examined. A nurse examined his ankle and observed a slight discoloration of his ankle. She entered into the daily emergency room records petitioner's statement that he had injured his foot going over a roof, though she admitted, on cross-examination, that a police officer may have made the statement (812-84, 827).

To rebut this evidence that petitioner had voluntarily confessed to the crime, the evidence on the trial record, which also became part of the Huntley Hearing record, contained testimony by petitioner denying that he had committed the crime. He claimed that he was at the store where he worked or at a Mrs. Harris' place from about 7 P.M. until 8:45 P.M. on the evening of December 23, 1960, and that he had injured his leg and foot that day by first slipping on ice while delivering a Christmas tree and then, dropping a bundle of trees on his foot (1157, 1172-4).

With respect to the circumstances of the confession itself, petitioner stated that, when he went to the station house at about 3 P.M. on December 27, he was taken into Lt. Willis' office with several other officers (1201). He claimed that they swore at him and that he was afraid. He said Lt. Willis began telling him things about the murder, he agreed with him and began making up a few things too (1190, 1192). Then he repeated his confession several times to the other officers.

He also admitted confessing to his mother when he was taken to his home at about 6:15 P.M. but claimed that he winked his eye at that time (1200). Similarly, he claimed that he only told Larry Culkin the knife was his because Lt. Willis had made a fist and told him to do so. He also stated that it was Det. Farrell, not he, who told the nurse at Jewish Memorial Hospital that he injured his ankle going over a roof (1204).

To rebut this testimony, the officers present during the questioning of petitioner testified that they did not threaten petitioner or hear or see anyone else do so (1693, 1783). Clearly, they also did not punch, kick or slap him since petitioner himself admitted this fact at trial (1360). Lt. Willias and Det. Farrell also stated that, contrary to petitioner's testimony, petitioner did not ask to get in touch with his mother or a lawyer and he gave all the details of his confession himself (1767-9, 1783). Det. Brady also

testified that petitioner did not wink when he told his mother he had killed Robert Guittari (1712).

In addition to the trial record, testimony was given at the Huntley Hearing on petitioner's behalf. William Kummer, a lawyer and family friend, arrived at the station house at about 7:40 P.M. on December 27, 1960. He first saw petitioner about four hours later (H-12a, 15a). William Vogt, petitioner's cousin, also testified, stating that he was having dinner at petitioner's home with petitioner's mother, grandfather, and brothers at the time petitioner returned from the station house with the officers (H-20a). He said that, when petitioner was told to tell his mother what he had told the officers, an officer seemed to poke him in the back with an object resembling a flashlight. William Vogt did not hear the petitioner say anything (H-21a-24a). William Vogt was only twelve years old in 1960 (H-19a).

On the basis of more than 2,000 pages of trial record which, together with the testimony given at the Huntley Hearing, became the record in the Huntley Hearing, Justice Sarafite, the judge who had presided at petitioner's trial several years earlier, found beyond a reasonable doubt that: 1) the police officers did not make any threat to the petitioner and 2) that the petitioner was not in fear when he made statements to the police". He based these findings on the testimony which indicated that no one had struck petitioner at any time before he made incriminating statements, and on police officer testimony denying that any threats had been made. This latter testimony was supported, in Justice Sarafite's opinion, by the fact that petitioner did not tell his mother or the Assistant District Attorney of these alleged threats, even though he was given ample opportunity to do so. Moreover, the trial judge rejected petitioner's claims that he had been threatened and that he was fearful because of these alleged threats. He stated that he disbelieved petitioner's testimony because his demeanor on the witness stand, including

his apparent familiarity with the language he attributed to the police officers, suggested that he would not have been easily frightened by such language. This, Justice Sarafite concluded beyond a reasonable doubt that petitioner's initial confession, his confession to his mother, and his later re-enactment of the crime were all incriminating statements that were made voluntarily and not under the influence of fear produced by any threats, violence, coercion or mistreatment. *Id.* at p. 4.

He also concluded that there was no testimony to support the claim that the statement made to the nurse at Jewish Memorial Hospital was coerced. He found that this statement was properly admitted into evidence as a statement which was not made to a law enforcement officer. *Id.* at pp. 3-4.

These factual findings and conclusions of law were found by the District Court, after a careful examination of the entire Huntley Hearing record by Judge Edmond Port, to have been supported by the record. Judge Port concluded that:

> ". . . petitioner has had a full and fair hearing that resulted in reliable findings by the state court, which are fully supported by the record. *Townsend* v. *Sain*, 372 U.S. 293 (1963). The petitioner has failed to overcome the statutory presumption of correctness applicable to the state court determination. 28 U.S.C. § 2254(d)." (A-8 to A-9).

Judge Port also rejected petitioner's remaining claims concerning access to counsel and the remand of his Huntley Hearing to Justice Sarafite, the Judge who had presided at his trial.

The Court of Appeals affirmed Judge Port's order without opinion (A-12 to A-13).

Reasons for Denying Certiorari

I

Since the instant petition involves only the application of settled law to the facts it would be inappropriate for this court to exercise its certiorari jurisdiction to review the fact-finding of the state court and the determination below that the state court's findings were fully supported by the record.

As Justice Holmes stated in *United States* v. *Johnston*, 268 U.S. 220, 227 "We do not grant certiorari to review evidence and discuss specific facts." Yet, this petition is replete with repeated attempts to relitigate and overturn the factual determination adverse to him (Petition pp. 23-32).

This Court has emphasized the state court's responsibility in determining the facts surrounding admissions. *LaVallee* v. *Delle Rose*, 410 U.S. 690; *Procunier* v. *Atcheley*, 400 U.S. 446. The "Huntley" court carefully summarized the evidence before it and as in *Delle Rose, supra*, ". . . it can scarcely be doubted from its written opinion that . . . [petitioner's] factual contentions were resolved against him." *Id.* at 692. The District Court, as noted in its opinion-order denying petitioner relief, "fully reviewed the pertinent state court records" (A-8) and found that under the "totality of the circumstances" petitioner's admissions were voluntary and that petitioner "failed to overcome the statutory presumption of correctness applicable to the state court determination. 28 U.S.C. § 2254(d)." (A-8-A-9). Further, as noted above, the Court of Appeals affirmed without opinion (A-12-A-13).

Clearly, petitioner presents no basis for this court to exercise its certiorari jurisdiction to review the application of settled law to a factual determination by the state "Huntley" court reached after a full and fair hearing.

II

The decision of the court below was clearly correct

Petitioner was brought to Police Headquarters at approximately 3:10 P.M. in connection with the murder of a 14 year-old boy. By approximately 5:10 P.M. petitioner gave a verbal confession to Police negating his claim of a prolonged interrogation. He was then returned to his home and mother at approximately 6:00 P.M. whereupon he again confessed the crime to her in the presence of the police. Between 6:00 and 7:00 P.M. petitioner took the police to the scene of the crime where he re-enacted it for them. Petitioner's attorney arrived at the station house at 7:40 P.M. after the earlier confessions and re-enactment of the crime but before arrival of the Assistant District Attorney (2500-2). The lawyer was refused immediate access to the petitioner but the petitioner's statement to the Assistant District Attorney made at approximately 9:15 P.M. was *excluded* by the trial judge, who also struck from the record all references to the taking of the statement (2497-8).

At 11:45 P.M. the petitioner conferred with his counsel in the station house (3615) and after having been booked at about 11:00 or 11:15 P.M. he was treated at the hospital for an ankle injury incurred, petitioner told the nurse, in jumping from the roof (1943-62) during commission of the crime.

Since petitioner's trial pre-dated both *Miranda* v. *Arizona*, 384 U.S. 436 and *Escobedo* v. *Illinois*, 378 U.S. 478 they are inapplicable to his case. *Johnson* v. *New Jersey*, 389 U.S. 719. The standard to be applied is "the totality of the circumstances" (*Clewis* v. *Texas*, 386 U.S. 707, 708; *Frazier* v. *Cupp*, 394 U.S. 731, 739) which was the standard applied below to the historical facts determined in the state court hearing.

As this court observed in *Procunier* v. *Atcheley, supra* "Low intelligence, denial of the right to counsel and failure to advise of the right to remain silent" "went only to the weight to be given other evidence of actual factual coercion." *Id.* at 453. However, the circumstances of this case do not, in any manner, reveal a setting in which actual coercion was exerted. It is clear from the record that the state courts gave full consideration to the issue of voluntariness and applied the correct standard of constitutional law in allowing the admission in evidence of petitioner's statements.

b.

Petitioner claims denial of a fair hearing since the same justice who presided at trial conducted the "Huntley" Hearing. This contention is wholly without merit. This court in *Jackson* v. *Denno*, 378 U.S. 368, 391 fn. 19 specifically observed that:

> "Whether the trial judge, another judge, or another jury, but not the convicting jury, fully resolves the issue of voluntariness is not a matter of concern here. To this extent we agree with *Stein* [*Stein* v. *New York*, 346 U.S. 156] that the States are free to allocate functions between judge and jury as they see fit."

See also: *People* v. *Huntley*, 15 N Y 2d 72, 77, 204 N.E. 2d 179 (1965).*

Petitioner's final contention that he was denied effective assistance of counsel in that counsel at the "Huntley" Hearing was refused a reasonable adjournment to find witnesses and to prepare for the hearing is refuted by the Huntley Hearing minutes (H-1 to H-17; H-30 to H-32).

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*No objection was raised as to this by petitioner at the "Huntley" hearing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York, May 2, 1974.

Respectfully submitted,

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